

The claimant appealed the ALJ's 13 percent permanent partial general disability award. Claimant contends, after his February 22, 1999, work-related accident, he returned to work with restrictions to an accommodated job. Claimant argues that respondent then terminated him for questionable excessive absences from the accommodated position. Thus, claimant argues because he was terminated from an accommodated job he is not limited to his permanent functional impairment but is entitled

to an 86.5 percent work disability based on a 73 percent work task loss and a 100 percent wage loss.<sup>1</sup>

Conversely, respondent argues that claimant was terminated for cause and he is, therefore, limited to his permanent functional impairment and requests the Board to affirm the ALJ's Award. Respondent argues claimant was terminated in good faith for excessive absenteeism not associated with his work-related low back injury. Accordingly, respondent argues, claimant is not entitled to a work disability award because he would have remained employed by respondent at a comparable wage had he not been terminated for violation of respondent's attendance policy.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the briefs and the parties' oral arguments, the Board makes the following findings and conclusions:

The ALJ's Award sets out findings of fact and conclusions of law in some detail. It is not necessary to repeat those findings and conclusions in this Order. Except as to the ALJ's reasoning as to why claimant's termination denied claimant a work disability, the Board adopts the findings and conclusions of the ALJ as its own as if specifically set forth herein.

Claimant injured his low back while working for the respondent on February 22, 1999. Respondent provided medical treatment for claimant's low back injury with Dr. Bernard Poole. Dr. Poole first saw claimant on March 15, 1999. Dr. Poole returned claimant to light duty work with a 15 to 20 pound lifting restriction. He prescribed medication and placed claimant in a physical therapy program. Claimant returned to his regular work as a machine operator but was assisted by other employees when heavy lifting was required. While still under Dr. Poole's medical treatment, respondent terminated claimant for violation of its attendance policy on June 28, 1999.

Claimant's attendance problems started before his February 22, 1999, work injury. The first Notation of Corrective Counseling Session was issued November 11, 1998, for leave without pay for absences occurring on October 22, 1998, for 3.9 hours and on October 26, 27, and 28 for eight hours each of those three days. The final Corrective Action Memo was issued on June 28, 1999, terminating claimant from respondent's employment for failure to maintain acceptable attendance.

The record contains claimant's testimony, the testimony of Kevin W. Jamis, claimant's supervisor on the date of his termination and the testimony of Donald D. Brewer, third shift people's support representative. All three testified concerning the facts

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<sup>1</sup> See K.S.A. 1998 Supp. 44-510(e).

leading up to the claimant's termination. After claimant was terminated, he filed a grievance requesting reinstatement for wrongful termination and the union eventually dismissed the grievance.

The claimant argues that even if he was terminated for cause he remains entitled to a work disability because he was released with work restrictions and returned to an accommodated job. In support of this argument, claimant cites the Niesz case which held, "Once the accommodated job ends, the presumption of no work disability may be rebutted."<sup>2</sup> But in Niesz the court found that claimant's termination was not made in good faith because respondent inadequately investigated the facts relating to the termination.

The Board agrees that the test of whether a termination disqualifies an injured worker from entitlement to a work disability remains one of good faith, on the part of both claimant and respondent.<sup>3</sup> In this case, claimant was terminated for violation of the respondent's attendance policy. Respondent's policy provides for termination for attendance if the employee receives the third Corrective Action Memo for two or more infractions of absenteeism in a 12 month period. Claimant received the third Corrective Action Memo, and in accordance with respondent's policy was terminated on June 18, 1999. Although claimant disputes the reasonableness of the termination, the Board finds the record fails to establish that the termination was made because of claimant's work-related injuries or in bad faith. In fact, the Board finds claimant failed to act in good faith when he accrued absences without pay knowing that the absences would result in an infraction and eventual termination. The Board concludes claimant's violation of respondent's attendance policy was tantamount to a refusal to perform appropriate work as in Foulk<sup>4</sup> or failure to make a good faith effort to find appropriate employment after recovering from work-related injuries as described in Copeland.<sup>5</sup> Accordingly, because claimant was terminated for misconduct, as held in Ramirez<sup>6</sup>, his permanent partial general disability award is based upon his permanent functional impairment.

### AWARD

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<sup>2</sup> Niesz v. Bill's Dollar Stores, 26 Kan. App. 2d 737, Syl. ¶12, 993 P.2d 1246 (1999).

<sup>3</sup> See Helmstetter v. Midwest Grain Products, Inc., \_\_\_\_ Kan. App. 2d \_\_\_\_, 18 P.3d 1987 (2001) and Oliver v. The Boeing Co., 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 886 (1999).

<sup>4</sup> Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

<sup>5</sup> Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

<sup>6</sup> Ramirez v. Excel Corporation, 26 Kan. App. 2d 139, 979 P.2d 1261, *rev. denied* 267 Kan. \_\_\_\_ (1999).

**WHEREFORE**, it is the finding, decision and order of the Board that ALJ John D. Clark's February 13, 2001, Award should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 2001.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James A. Cline, Attorney for Claimant  
Kirby A. Vernon, Attorney for Respondent  
John D. Clark, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director